

Jan 27, 2001 05:58pm From-SPDE BUS AND LEGAL AFFAIRS



Viant Corporation
89 South Street
Boston, MA 02111
617-531-3700 main
617-531-3803 fax
<http://www.VIANT.com>

Master Services Agreement

MSA Number: _____ Effective Date: May 25, 1999

Customer: Sony Pictures Digital Entertainment Inc.
 10202 West Washington Boulevard
 Culver City, California 90232-3195

Administrative Contact:

Name: Scott Sherr
 Title: V.P., Business Development and Strategy.
 Phone: 310-840-8629
 Fax: 310-840-8670
 E-mail: sscherr@sonypictures.com
 Address (if different): _____

Technical Contact:

Name: Doug Chey
 Title: SVP, Technology
 Phone: 310 - 840-8851
 Fax: 310-840-8707
 E-mail: dchey@sonypictures.com
 Address (if different): _____

Legal Contact:

Name: Coril Berg
 Title: SVP Business Affairs
 Phone: 310 840 7330
 Fax: 310 840 7332
 E-mail: cberg@sonypictures.com
 Address (if different): _____

Invoices:

Name: Scott Peyton
 Title: Finance
 Phone: 310-840-7303
 Fax: 310-840-7307
 E-mail: speyton@sonypictures.com
 Address (if different): _____

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MASTER SERVICES AGREEMENT

BETWEEN

VIANT

AND

SONY PICTURES DIGITAL ENTERTAINMENT INC.

This MASTER SERVICES AGREEMENT ("Agreement") is made as of the Effective Date set forth on the cover of this document by and between Viant Corporation, having its principal place of business at 89 South Street, Boston, MA 02111 ("Viant") and Sony Pictures Digital Entertainment Inc. ("Customer").

WHEREAS, Customer wishes to engage Viant to provide it with certain services as described in the applicable Work Order or Engagement Letter (each as defined below) and the Exhibits, if any, attached thereto;

WHEREAS, Viant is willing to provide such services on the terms and conditions set forth in this Agreement.

NOW, THEREFORE, for good and valuable consideration, the parties hereto hereby agree as follows:

1. Definitions

(a) Confidential Information shall have the meaning set forth in Section 5(a) below.

(b) Course Materials shall mean any and all reference manuals, student guides, demonstration software and other training materials provided by Viant in connection with Training Services including, without limitation, materials provided by third party vendors to Viant specifically for Viant Training Services.

(c) Deliverables shall mean any and all materials, including without limitation, any information, designs, specifications, instructions, software, data, Course Materials, computer programming code, reusable routines, computer software applications, and any documentation relating to any of the foregoing, that Customer has contracted Viant to develop and as more fully specified in a Work Order or as delivered to Customer.

(d) Facilities shall mean the equipment and other resources which together constitute a reasonable work environment in which Viant may perform the Services hereunder, including without limitation, reasonable workspace, telephone and facsimile capabilities, computer network connectivity and any other resources set forth on a Work Order.

(e) Framework Software shall mean the

software described in the Framework Software License attached hereto, if any.

(f) Services shall mean the Consulting Services and/or Training Services (as defined in Sections 2(a) and 2(b) below, respectively) performed by Viant for Customer under the terms of this Agreement, pursuant to and as described in a Work Order.

(g) Work Order shall mean Viant's standard form letter agreement for ordering Services, which sets forth and describes the obligations of Customer and Viant, including any Services to be performed by Viant and all applicable fees. Unless otherwise specified on a Work Order, each Work Order shall be governed by the terms of this Agreement and shall be incorporated herein. Viant shall, in its sole discretion, use Work Orders on a per project basis.

(h) Work Product means the results and proceeds of Viant's Services hereunder, including without limitation, any and all Deliverables and other materials provided to Customer hereunder.

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2. Services

(a) Consulting Services. Viant will provide consulting services as specified in the Work Order, according to the terms of this Agreement ("Consulting Services"). If a Framework Software License between the parties is attached hereto, Viant will also provide Customer with copies of the Framework Software described therein.

(b) Training Services. Viant will provide Customer with training courses if, and as, specified in the applicable Work Order ("Training Services"). Training Services shall only be available to Customer's employees and to contractors who have signed a non-disclosure agreement with Viant that is at least as equally protective of Viant's interests as this Agreement and which requires the contractor to use any information or training received only in conjunction with Customer's business.

(c) Changes to Services. In the event Customer requests changes to Work Orders, Viant will notify Customer in writing of the impact upon the work schedule, price, payment terms, project dependencies and assumptions and/or project deliverables. Customer will then, within ten business days, notify Viant in writing of its acceptance or rejection of the changes to the Services. If accepted, the terms of such change shall replace the relevant sections of the applicable Work Order. If not accepted in writing by Customer within ten business days no change shall occur.

(d) Project Delays. For fixed price Work Orders, Customer will not be responsible for the payment of additional fees for delays resulting from circumstances within Viant's control. However, if a fixed price Statement of Work is delayed or if additional Viant resources are required because of a failure by Customer to perform, or to timely perform any obligation, such event shall, after advance written notice is provided to Customer, giving Customer a reasonable time to perform, and after Viant makes reasonable attempts to work around to mitigate the impact of Customer's failure to perform, constitute a change and Customer will compensate Viant for the additional Viant resources and/or time required as a result thereof.

(e) Nonexclusive Services. Viant's services under this Agreement shall be nonexclusive.

3. Fees

(a) Consulting Services. In consideration for Viant's performance of the Consulting Services, Customer shall pay to Viant the fee(s) set forth in the applicable Work Order. Unless otherwise indicated on the applicable Work Order, Consulting Services shall be provided on a fixed-fee basis. Any additional Consulting Services that Customer requests and Viant agrees to provide shall be provided on terms to be mutually agreed upon by the parties. If Consulting Services are to be provided on a time and material basis, the applicable Work Order must so indicate and must describe the scope and charges for such Consulting Services.

(b) Training Services. If applicable and unless the applicable Work Order specifies otherwise, Viant will provide Training Services based on a per student, per day charge plus materials basis. If Training Services are to be provided on a fixed fee basis, the applicable Work Order or engagement letter must so indicate and must describe the scope and charges for such Training Services.

(c) Framework Software. Customer shall pay Viant the license fees set forth in the Framework Software License, if any such license is attached hereto.

(d) Expenses. If indicated in the applicable Work Order, Customer shall reimburse Viant for all reasonable travel, communications and out-of-pocket expenses (including, without limitation, transportation, communication, lodging and meal expenses) incurred in connection with Viant's performance of the Services. Otherwise, if the expense issue is not indicated in the Work Order, Customer shall not be responsible for the reimbursement of travel and living and other project related expenses incurred by Viant incurred in connection with Viant's performance of the Services.

(e) Invoicing and Payment. Viant will invoice Customer (i) monthly for Consulting Services rendered during the preceding month (ii) upon completion of each course for Training Services and (iii) upon delivery of the Framework Software, if any. Payment of all invoices are due and payable within forty-five days (45) days of the receipt of an invoice. Customer will make all payments without right of set-off or chargeback. All payments made pursuant to this Agreement shall be made in U.S. dollars.

(f) Taxes. Fees do not include any present or future sales, use, value added, excise or similar

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taxes applicable to the Services or associated expenses. Viant will separately itemize any applicable taxes on each invoice, or in lieu thereof. Customer shall furnish Viant a properly executed tax exemption certificate, if applicable. Customer shall be responsible for paying any applicable taxes later assessed by a government agency.

(g) Additional. If Customer cancels or reschedules Training Services less than five (5) business days before its scheduled start date, there will be a cancellation fee of fifty percent (50%) of the specified Training Services fee. Such cancellation fee shall be due and payable at the same time as the fee for the applicable Training Services.

4. Proprietary Rights

a) Customer Intellectual Property Rights.

Except as otherwise provided herein, Customer shall own and retain all right, title, and interest in and to any technology or information otherwise developed or created solely for Customer by Viant, including any intellectual property rights therein. Customer shall own all right, title and interest in any modifications, improvements, or derivative works of deliverables created by Customer, or by Viant or by its Contractors.

b) Viant Intellectual Property Rights.

Except as otherwise provided herein, Viant shall own and retain all right, title, and interest in to any pre-existing methods, technology or information ("Pre-Existing Materials") otherwise owned, developed or created solely by Viant that is later incorporated into a Deliverable, provided that only with respect to such Pre-Existing Materials used after July 1, 2000, Viant must identify such methods, technology, or information in the applicable Work Order or any applicable amendment or Change Order.

c) Jointly Developed Property Rights.

The parties acknowledge that during the course of the Services, certain tangible and intangible and now known or hereafter existing (i) rights associated with works of authorship throughout the universe, including but not limited to copyrights, moral rights, and mask-works, (ii) trademark and trade name rights and similar rights, (iii) trade secret rights, (iv) patents, designs, algorithms and other industrial property rights, (v) all other intellectual and industrial property and proprietary rights (of every kind and nature throughout the universe and however designated), whether arising by operation of law, contract, license or otherwise, and (vi) all registrations, applications, renewals,

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extensions, continuations, divisions or reissues thereof now or hereafter in force throughout the universe (including without limitation rights in any of the foregoing) ("Intellectual Property Rights") may be jointly developed by the parties or that Customer may solely develop Intellectual Property Rights that improve the Deliverables or Pre-Existing Materials (the "Customer Intellectual Property Rights"). The parties agree that such jointly developed Intellectual Property Rights and the Customer Intellectual Property Rights shall be solely owned by Customer. Also, the parties shall mutually agree on seeking any protection or registration of such jointly developed Intellectual Property Rights.

d) Grants

Notwithstanding the preceding, Customer grants to Viant a perpetual, fully paid, world-wide, non-exclusive license to use and sublicense, for any purpose, components of the Deliverables that perform commonplace, ordinary or generic functions ("Generic Components") that do not embody or disclose Customer's Confidential Information; provided however, that such license to Viant shall not include Generic Components for which Customer has (i) identified the protectable intellectual property in writing to Viant within 60 days after and (ii) filed for either trademark or patent protection within 180 days after the date that the applicable Customer website goes live or is available for viewing on the worldwide web (the "Launch Date"). Viant grants to Customer a perpetual, fully paid, worldwide, non-exclusive, license to use the Pre-Existing Materials in connection with the Deliverables.

5. Confidentiality

(a) Confidential Information. As used in this Agreement, the term "Confidential Information" shall mean all information about either party's business, business plans, customers, strategies, trade secrets, operations, records, finances, assets, technology, data and information that reveals the processes, methodologies, technology or know how by which either party's existing or future products, services, applications and methods of operation are developed, conducted or operated and other confidential or proprietary information designated as such in writing by the Disclosing Party, whether by letter or by the use of an appropriate Confidential stamp or legend, prior to or at the time any such trade secret or confidential or proprietary information is delivered, or disclosed, by the Disclosing Party to the Receiving Party or is orally or visually disclosed to the Receiving Party by the Disclosing Party. Information which is orally or visually disclosed to the Receiving Party by the

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Disclosing Party, or is disclosed in writing without an appropriate letter, confidential stamp or legend, shall constitute Confidential Information if (i) it would be apparent to a reasonable person, familiar with the Disclosing Party's business and the industry in which it operates, that such information is of a confidential or proprietary nature the maintenance of which is important to the Disclosing Party or if (ii) the Disclosing Party, prior to the end of services, delivers to the Receiving Party a written document or documents describing such information and referencing the place and date of such oral, visual or written disclosure and the names of the employees or officers of the Receiving Party to whom such disclosure was made provided that the components of the Deliverables referenced in Section 4(b) and 4(c) shall not constitute the Confidential Information of either party.

(b) Disclosure of Confidential Information. The Receiving Party shall hold in confidence, and shall not disclose (or permit or suffer its personnel to disclose) to any person outside its organization, any Confidential Information. The Receiving Party and its personnel shall use such Confidential Information only for the purpose for which it was disclosed and shall not use or exploit such Confidential Information for its own benefit or the benefit of another without the prior written consent of the Disclosing Party. Without limitation of the foregoing, the Receiving Party shall not cause or permit reverse engineering of any Confidential Information or recompilation or disassembly of any software programs which are part of the Confidential Information received by it under this Agreement and shall disclose Confidential Information only to persons within its organization who have a need to know such Confidential Information in the course of the performance of their duties and who are bound by a written agreement, enforceable by the Disclosing Party, to protect the confidentiality of such Confidential Information. The Receiving Party shall adopt and maintain programs and procedures that are reasonably calculated to protect the confidentiality of Confidential Information and shall be responsible to the Disclosing Party for any disclosure or misuse of Confidential Information that results from a failure to comply with this provision. The Receiving Party shall be fully responsible for any breach of this Agreement by its agents, contractors, representatives and employees. The Receiving Party will promptly report to the Disclosing Party any actual or suspected violation of the terms of this Agreement and will take all reasonable further steps requested by the Disclosing Party to prevent, control or remedy any such violation.

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(c) Limitation on Obligations. The obligations of the Receiving Party specified in Section 5 above shall not apply, and the Receiving Party shall have no further obligations, with respect to any Confidential Information to the extent Receiving Party can demonstrate, by clear and convincing evidence, that such Confidential Information:

- (i) is generally known to the public at the time of disclosure or becomes generally known through no wrongful act on the part of the Receiving Party;
- (ii) is in the Receiving Party's possession at the time of disclosure otherwise than as a result of Receiving Party's breach of any legal obligation;
- (iii) becomes known to the Receiving Party through disclosure by sources other than the Disclosing Party having the legal right to disclose such Confidential Information;
- (iv) is independently developed by the Receiving Party without reference to or reliance upon the Confidential Information; or
- (v) is required to be disclosed by the Receiving Party to comply with applicable laws or governmental or regulatory regulations, provided that the Receiving Party provides prior written notice of such disclosure to the Disclosing Party and takes reasonable and lawful actions to avoid and/or minimize the extent of such disclosure.

In the event of a disputed disclosure, the Receiving Party shall bear the burden of proof of demonstrating that the information falls under one of the above exceptions.

(d) Ownership of Confidential Information. The Receiving Party agrees that the Disclosing Party is and shall remain the exclusive owner of the Confidential Information and all patent, copyright, trade secret, trademark and other intellectual property rights therein. No license or conveyance of any such rights to the Receiving Party is granted or implied under this Agreement.

(e) Return of Documents. The Receiving Party shall, upon the termination of this Agreement or the request of the Disclosing Party, return to the Disclosing Party all drawings, documents, and other tangible manifestations of Confidential Information received by the Receiving Party pursuant to this Agreement (and all copies and reproductions thereof).

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(f) Mutual Cooperation. Each party will notify and cooperate with the other party in enforcing the disclosing party's rights if it becomes aware of a threatened or actual violation of the disclosing party's confidentiality requirements by a third party. Upon reasonable request by the disclosing party, the receiving party will provide copies of the confidentiality agreements entered into with its agents or independent contractors.

(f) Injunctive Relief. Customer and Viant acknowledges that any breach of the provisions of this Section 5 may cause irreparable harm and significant injury to an extent that may be extremely difficult to ascertain. Accordingly, both parties agree that in addition to any other rights or remedies available to them at law or in equity, either party will also have the right to seek injunctive relief to enjoin any breach or violation of this Section 5.

(g) Pre-Existing NDA

Notwithstanding any provision above, the parties agree that the Non-Disclosure Agreement dated October 4, 1999 shall remain in full force and effect.

6. Indemnity, Warranty and Liability

(a) Indemnity. Each party (the "Indemnifying Party") will, at its expense, defend and indemnify the other party (the "Indemnified Party") against a claim that any information, design, specification, instruction, software, data or other material furnished to the other party (the "Indemnifying Party Information") infringes a copyright, trademark or patent or misappropriates a trade secret and will pay all losses, liabilities, damages, claims and related expenses (including attorney fees) either awarded by court or agreed to in an out-of-court settlement. Notwithstanding the above, the Indemnifying Party shall have no liability under this Section 6(a) for any claim of infringement based on (i) modifications, adaptations or changes to any Indemnifying Party Information not made by the Indemnifying Party, (ii) the combination or use of any Indemnifying Party Information with any materials not furnished by Indemnifying Party, if such infringement would have been avoided by use of the Indemnifying Party Information alone, or (iii) the use or incorporation of any materials supplied to the Indemnifying Party by the Indemnified Party. In the event any Indemnifying Party Information is held to, or the Indemnifying Party believes is likely to be held to, infringe the intellectual property rights of a third party, the Indemnifying Party shall have the right at its sole option and expense to (x) substitute or modify the Indemnifying Party Information so that it is non-infringing, or (y) obtain for the Indemnified Party a license to continue using the Indemnifying

Party Information. This Section sets forth the parties sole and exclusive remedy for Intellectual property infringement.

(b) Indemnification Procedures. If either party becomes aware of a claim that may require indemnification, the Indemnified Party will promptly notify the Indemnifying Party in writing of the claim and will allow the Indemnifying Party to assume full control of the defense and settlement of the claim. The Indemnified Party will provide the Indemnifying Party with the assistance and information necessary to defend and settle the claim.

(c) Warranty. Each party represents and warrants to the other party that it has the full power, right and authority to enter into and perform this Agreement with the other party. Viant further represents and warrants that the Services will be performed in a professional manner, consistent with generally accepted industry standards. For any breach of such warranty, Customer's exclusive remedy and Viant's entire liability shall be the re-performance of the Services. Customer must request such remedy from Viant in writing not more than fifteen (15) business days following the completion of the Services. Viant further represents and warrants that any software Deliverables, including but not limited to, computer programming code, reusable routines, and computer software applications shall perform in accordance with their applicable specifications at the time of completion of the Services. Customer warrants that it owns or has the right to provide to Viant Customer's Confidential Information. EXCEPT AS SET FORTH IN THIS SUBSECTION NEITHER PARTY MAKES ANY WARRANTY, EXPRESS OR IMPLIED IN CONNECTION WITH THE SERVICES DELIVERABLES, AND INDEMNIFYING PARTY INFORMATION, INCLUDING THE RESULTS AND PERFORMANCE THEREOF, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTIES OF MERCHANTABILITY, NONINFRINGEMENT OR FITNESS FOR A PARTICULAR PURPOSE.

(d) Limitation of Liability.

THE MAXIMUM LIABILITY OF VIANT TO CUSTOMER FOR DAMAGES RELATING TO VIANT'S FAILURE TO PERFORM THE (A) CONSULTING SERVICES OR (B) A CLAIM OF INTELLECTUAL PROPERTY INFRINGEMENT PURSUANT TO SECTION 6(a) HEREIN, SHALL BE LIMITED TO THE MAXIMUM TOTAL INSURANCE COVERAGE MAINTAINED BY VIANT AT THE TIME OF AN INCIDENT THAT GIVES RISE TO A CLAIM. VIANT WARRANTS

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AND REPRESENTS THAT THE MINIMUM VALUE OF SUCH INSURANCE COVERAGE WILL NOT BE LESS THAN TEN MILLION DOLLARS (\$10,000,000).

NOTWITHSTANDING THE FOREGOING, IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR (X) ANY LOST DATA OR CONTENT, LOST PROFITS, BUSINESS INTERRUPTION OR FOR ANY INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL, EXEMPLARY OR PUNITIVE DAMAGES ARISING OUT OF OR RELATING TO THE SOFTWARE OR THE SERVICES PROVIDED HEREUNDER, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, OR OTHERWISE FOR ANY SUCH CLAIM.

7. Term and Termination

(a) Term. The term of this Agreement shall commence on the Effective Date shown on page 1 of this Agreement and shall continue until terminated pursuant to this Section 7.

(b) Termination for Breach. Either party may terminate this Agreement or any outstanding Work Order if the other party is in material breach of the terms of this Agreement or such Work Order and has not remedied the breach within thirty (30) days of written notice specifying the breach.

(c) Effect of Termination. Upon termination of such Work Order, the following shall apply:

(i) Services for such Work Order shall cease at that time.

(ii) Customer shall pay all amounts due and payable under this Agreement for all Services rendered by Viant through the date of termination. With respect to Services provided by Viant on a fixed fee basis, if any, Customer shall pay Viant a portion of such fixed fee amount equal to the percentage time of the work schedule that has been completed as of the date of such termination.

(iii) All rights and obligations provided under Sections 3 (to the extent any fees or taxes remain unpaid or expenses have not been reimbursed), 4, 5, 6, 8 and 9 shall survive such termination for any reason; provided that Section 5(b) shall survive for a period of three (3) years following such termination for any reason.

(iv) Neither party will be liable to the other for damages, losses, costs or expenses whatsoever on

account of such termination arising from or in connection with the loss of prospective sales, expenses incurred or investments made with the establishment, development or maintenance of either party's business.

(v) Termination will not affect any claim, demand, liability or right of Customer or Viant made prior to such termination, except as described in subsection (iv) above.

8. Non-Compete

Until the earlier of (i) the one-year anniversary of the Launch Date of the Moviefly service; (ii) the one-year anniversary of the date on which Viant completes contracted professional services for the Moviefly service; and (iii) February 1, 2002, Viant hereby covenants and agrees that it will not, on its own or together with any of its affiliated companies, perform any services to or participate in any Competing Business. For purposes of this Section 8, a "Competing Business" shall mean a business which, as of the date on which Viant commences rendering services therefor or participates therein, is owned or operated, in whole or in part, (where "owned" means an equity interest greater than 3%), by any Competing Company, which business is engaged in the delivery of feature-length motion pictures via the internet to Private Residential Dwellings. For purposes of this Section 8, the term "Competing Company" shall mean Warner Bros., Universal Pictures, The Walt Disney Company, Paramount Pictures, Dreamworks, MGM, 20th Century Fox or Blockbuster Video or any of their affiliated companies. For purposes of this provision, the term "Private Residential Dwellings" shall mean private residences (e.g., homes, condominiums, apartments), and shall specifically include school dormitories, hotel rooms and hospital rooms but shall specifically exclude theaters. Viant further agrees that it will not and may not frustrate the intent and purpose of this Section 8 by performing services or participating in a business, which at the time of commencement of such performance or participation, was not owned or operated by a Competing Company, but which Viant knows will be owned by a Competing Company at any point during the time period for this Section 8 specified above.

9. Miscellaneous

(a) No Solicitation. Unless otherwise approved in writing, for the term of any Work Order and for six months beyond the end date specified in the Work Order, neither party will directly or indirectly solicit, (either individually or through a third party), to any employee of the other who is involved in the development, use or provision of Services to

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Customer.

(b) Assignment. Neither party shall assign, transfer nor pledge this Agreement without the prior written consent of the other party, such consent to any assignment shall apply only to the given instance, and shall not be deemed a consent to any subsequent act. Subject to the foregoing, this Agreement inures to the benefit of and is binding upon the successors and assigns of the parties hereto. Notwithstanding the foregoing, Customer shall be permitted to make an assignment to any company it owns or controls or is affiliated with or related to, as well as to any other motion picture company.

(c) Relationship between the Parties. Neither Customer nor Viant is a legal representative, agent, or a partner of the other. Each party will be solely responsible for payment of all compensation owed to its employees, as well as employment related taxes. Each party will maintain appropriate workers compensation for its employees as well as general liability insurance.

(d) Force Majeure. Neither party shall be liable for any failure or delay in performance of its obligations hereunder on account of strikes, riots, fires, explosions, acts of God, war, governmental action, or any other cause which is beyond that party's reasonable control.

(e) Entirety. This Agreement, together with the Non-Disclosure Agreement that was entered into by and between the parties hereto dated October 4, 1999, and all applicable Work Orders incorporated herein constitute the complete agreement between the parties and supersedes all previous and contemporaneous agreements, proposals, or representations, written or oral, concerning the subject matter of this Agreement. This Agreement may not be modified or amended except in a writing signed by a duly authorized representative of each party. Subject to this Section 8(e) and Section 2(c) above, no other act, document, usage, or custom shall be deemed to amend or modify this Agreement or any Work Order, as applicable. It is expressly agreed that any terms and conditions of any prior communications between Viant and Customer, shall be superseded by the terms and conditions of this Agreement and the applicable Work Order.

(f) Severability. In the event any provision of this Agreement is held to be invalid or unenforceable, the remaining provisions of this Agreement will remain in full force.

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(g) Beneficiaries. Viant and Customer shall be a third party beneficiary of all confidentiality agreements contemplated by Section 5(b) above.

(h) Governing Law. This Agreement shall be construed in accordance with the laws of the State of California excluding conflict of laws provisions, applicable to agreements made and fully performed therein.

(i) Settlement Attempt - Arbitration. Any and all claims, disputes, or controversies arising under, out of, or in connection with this Agreement or the breach thereof, (herein "dispute") shall be submitted to the chief operating officer of each party (or their designee) for a good faith attempt to resolve the dispute. The position of each party shall be submitted, and the individuals promptly thereafter shall meet at a neutral site. If the parties are unable to reach agreement within thirty (30) days following such meeting, then any dispute which has not been resolved within said thirty (30) days by good faith negotiations between the parties shall be resolved at the request of either party by final and binding arbitration, and neither party may terminate the Agreement based upon any such dispute except in accordance with the decision of the panel of arbitrators. Arbitration shall be conducted in New York, by three (3) arbitrators. The arbitrators shall be knowledgeable in the commercial aspects of custom software development, Internet applications, technical consulting services and copyright law and otherwise in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The parties shall select the arbitrators within fifteen (15) days after the receipt by the noticed party of the demand for arbitration delivered in the manner set forth herein for providing notice to the parties. If the arbitrators are not selected by the parties within said fifteen (15) days, then the American Arbitration Association shall select the arbitrators. The arbitrators shall make detailed written findings to support their award. The arbitrators shall render their decision no more than forty-five (45) days after the parties finally submit the claim, dispute or controversy to the panel. Judgment upon the arbitration award may be entered in any court having jurisdiction. As part of any award rendered the arbitrators shall determine the prevailing party on any claim or counterclaim and shall award to such prevailing party the costs and fees (including filing fees and other costs, as well as attorney consulting, accounting and expert witness fees) incurred by such party with respect to the claim or counterclaim on which such party prevailed.

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(j) Waiver. The failure by either party to enforce at any time any of the provisions of this Agreement, or to exercise any election or option provided herein, shall in no way be construed as a waiver of such provisions or options, nor in any way to affect the validity of this Agreement or any part thereof, or the right of either party thereafter to enforce each and every such provision.

(k) Publicity. Viant shall be allowed to use Customer's name on its customer lists and disclose the same to its present and potential customers after execution of this Agreement for a period of two years after Viant stops performing any Services for Customer. Customer agrees to include information concerning Viant and Viant's contribution to the MovieFly project in the "About Moviefly" section of the MovieFly website at all times during the first year while the site is publicly available. In addition Customer agrees that Yair Landau will, within one month of the market launch of the MovieFly service, grant a video testimonial describing Viant's involvement in, and contribution to, the MovieFly project. Customer shall have final approval rights

IN WITNESS WHEREOF, the parties hereto, by their duly authorized representatives, have set forth their signatures as of the date first set forth above.

VIANT CORPORATION

By: 

Name: Dwayne Nesmith

Title: CHIEF FINANCIAL OFFICER

Date: OCT. 11, 2000

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over the testimonial and any exhibition of such testimonial shall be in the complete, unedited, approved, version. Customer and Viant agree that at least two joint press releases concerning MovieFly and Viant's involvement and contribution to the MovieFly project and one joint Viant-Customer appearance at trade shows or conferences shall take place within one year of the launch of the MovieFly website. All press releases issued by either party referencing this Agreement or the Services performed hereunder shall require approval in writing of the press release copy by both parties.

(l) Notice. All notices, requests, consents and other communications required or permitted under this Agreement shall be in writing and shall be sent by reputable overnight courier, registered or certified mail, postage prepaid or transmitted by telegram or telefax if confirmed by such mailing, to Customer and Viant at their respective addresses set forth on page 1 of this Agreement. Either party may change its address by written notice to the other.

SONY PICTURES DIGITAL ENTERTAINMENT INC.

By: Yair Landau

Name: Yair Landau

Title: Pres. - SPDE

Date: OCT 13, 2000

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Exhibit A: Form of Work Order

VIANT

VIANT
 89 South Street
 Boston, MA 02111
<http://www.VIANT.com>

Work OrderXXXX999

This Work Order is incorporated into and governed by the Master Services Agreement number **MSANumber** dated **MSADate** between Viant, 89 South Street, Boston, MA 02111 ('Viant') and **CustomerName** ("Customer").

1. Consulting Services Description.*Description.***2. Location where Services are rendered.***Location.***3. Principal Contacts.**The principal contact for Viant for this Work Order is **ViantContact**.The principal contact for Customer for this Work Order is **CustomerContact**.**4. Schedule.**This Work Order will expire **ExpirationDate**.**5. Charges for the Services.**

Consulting Category	Start Date	End Date	Duration	Rate	Total Cost
Category	StartDate	EndDate	Duration	Rate	Cost
Total					TotalCost

DescriptionOfExpenses

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Accepted by:

VIANT

Customer

Signature: _____

Signature: _____

Name: _____

Name: _____

Title: _____

Title: _____

Date: _____

Date: _____

This Work Order is "Confidential Information," as defined in Section 5(a) of the Master Services Agreement, and can only be modified in accordance with the terms set forth in Section 2(d) thereof.

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Jan-28-2001, 06:03pm From-SPDE BUS AND LEGAL AFFAIRS

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T-322 P.025/027 F-514



MEMORANDUM

Date: December 11, 2000

To: Distribution

From: Corii D. Berg

cc:

Re: Viant/SPDE

*Viant (JDC
Change forward)*

Attached for your files is a fully-executed copy of Change Order #1 to the Work Order dated September 15, 2000 between Sony Pictures Digital Entertainment Inc. and Viant Corporation.

Distribution:

Peter Halt
Patrick Kennedy
Jennifer Kuo
Yair Landau
Jim Pickell
Susie Oh
Ira Rubenstein
Scott Sherr
Mitch Singer

a Sony Pictures Entertainment company

Jan-23-2001 06:03pm From-SPDE BUS AND LEGAL AFFAIRS

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T-322 P.026/027 F-514



Change Order #1

This **Change Order #1** is issued pursuant to, and modifies, the Work Order dated September 15, 2000 by and between **Sony Pictures Digital Entertainment Inc.** ("SPDE") and **Viant Corporation** ("Viant"). Any term not otherwise defined herein shall have the meaning assigned to it in the Work Order.

Service Information:

MovieFly
Project Name

Launch v 1.0 – Stage 2
Phase

Background:

On Friday, November 3, 2000 SPDE asked Viant to analyze the impact of a project scope change to the MovieFly Launch 1.0 project. The requested change involves the integration of Real Networks technology into the MovieFly site in addition to the Windows Media Player implementation already planned.

Viant completed the analysis and has revised the work schedule, under the assumption of no further changes to previously determined Launch 1.0 scope other than accommodation of Real's technology. Three documents: *Impact Assessment of Incorporating Real Networks*, *Dual Codec Impacts on the User Experience* and *Encryption & Licensing Architecture Impact Analysis* offer a detailed understanding of the changes to the site applications and delivery architecture.

Agreed upon Changes:

1. The end date for the Services is changed from January 15, 2001 to March 1, 2001 to address the additional work required by this Change Order. In the event the end date needs to be extended as due to bugs with Real's alpha stage solution, SPDE agrees to compensate Viant for the additional time required to remedy such bugs. Such additional compensation shall be mutually established by Viant and SPDE.
2. Viant's professional fees increase from \$4,492,000 to \$5,665,000 (an increase of \$1,173,000) to accommodate the additional time and scope.
3. Viant extends to SPDE an additional credit of \$176,000, to be used in connection with a future phase, if any, of meaningful work and to be identified within 1 year of execution of this agreement. For purposes of this agreement, the term "Meaningful Work" shall mean a project or work phase that fits within, and may be reasonably achieved by the Viant service model.

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4. Viant agrees to apply \$335,000 of SPDE's existing credit to finance a portion of the extension. Thus, Viant will invoice SPDE \$5,330,000 for the total Moviefly Launch - Stage 2 engagement.

5. The payment schedule will changed to the following:

Total Billing	Payment Amount & Due Date
\$5,330,000	\$1,492,000 to be invoiced at project kick-off (Unchanged)
	\$1,000,000 to be invoiced at week 6 (Unchanged)
	\$1,000,000 to be invoiced at week 12 (Unchanged)
	\$1,000,000 to be invoiced at week 18 (Unchanged)
	\$438,000 to be invoiced on January 15, 2001 (New)
	\$400,000 to be invoiced on March 1, 2001 (New)

6. Viant and SPDE agree that the remaining SPDE credit for future work is \$1,002,000.

7. All other terms and conditions remain the same, including but not limited to, Viant's non-compete obligations and the travel and living percentage expense limitation.

Viant Corporation

By: 

Name: Brian Lakamp

Title: Senior Client Partner

Date: November 13, 2000

Sony Pictures Digital
EntertainmentBy: 

Name: Yair Landau

Title: President

Date: _____